

**FINAL AWARD DENYING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 06-132150

Employee: Matthew Sisak  
Employer: Labor Finders  
Insurer: Ace American Insurance Company (ESIS)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Dismissed)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 11, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Victorine R. Mahon, issued December 11, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 28<sup>th</sup> day of April 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## **AWARD**

Employee: Matthew Sisak

Injury No. 06-132150

Dependents: N/A

Employer: Labor Finders

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Additional Party: Treasurer of the State of Missouri as  
Custodian of the Second Injury Fund (Dismissed)

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Insurer: Ace American Insurance Company (ESIS)

Hearing Date: November 2, 2009

VRM/db

### **FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: Alleged April 28, 2006.
5. State location where accident occurred or occupational disease was contracted:  
Alleged to have occurred in Springfield, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? No.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease was contracted: Claimant contends a repetitive trauma over a period of one work shift resulted in injury to his right shoulder.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Right shoulder and biceps tendon.

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- 14. Nature and extent of any permanent disability: None awarded.
- 15. Compensation paid to date for temporary disability: None.
- 16. Value necessary medical aid paid to date by employer/insurer? None.
- 17. Value necessary medical aid not furnished by employer/insurer? None Awarded.
- 18. Employee's average weekly wages: \$195.00.
- 19. Weekly compensation rate: \$130.00
- 20. Method wages computation: By agreement of the parties.

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable: None.
- 22. Second Injury Fund liability: N/A.

TOTAL: NONE.

- 23. Future requirements awarded: None.

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Matthew Sisak

Injury No. 06-132150

Dependents: N/A

Employer: Labor Finders

Additional Party: Treasurer of the State of Missouri as  
Custodian of the Second Injury Fund (Dismissed)

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

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### **INTRODUCTION**

The parties appeared before the undersigned Administrative Law Judge for a Final Hearing on November 2, 2009, in Springfield, Greene County, Missouri. Matthew C. Sisak, (Claimant) appeared in person and by attorney Randy Alberhasky. Attorney Michael Mayes appeared on behalf of Labor Finders and its insurer, Ace American Insurance Company, (hereafter referenced collectively as Employer). Prior to the start of the proceedings, Claimant moved to voluntarily dismiss the Second Injury Fund. That motion was granted and the Second Injury Fund is dismissed. The Claimant seeks payment of past and future medical bills and Permanent Partial Disability. The parties agreed to the following facts:

### **STIPULATIONS**

1. On April 28, 2006, Labor Finders was an employer operating subject to the Missouri Workers' Compensation Law.
2. Labor Finders' liability was fully insured on that date by Ace American Insurance Company.
3. Claimant was working as an employee covered under the Missouri Workers' Compensation Law on the date of the alleged injury.

4. Jurisdiction and venue are appropriate in Springfield, Greene County, Missouri.
5. The claim for compensation was filed within the time prescribed by law.
6. Claimant's rate of compensation is \$130.00 per week.

### **ISSUES**

1. Did Claimant sustain an injury by occupational disease/repetitive trauma while working for Employer Labor Finders on April 28, 2006?
2. Was notice provided as required by § 287.430 RSMo?
3. Did Claimant's injuries arise out of and in the course of his employment with Labor Finders?
4. What is the nature and extent of disability?
5. Is Claimant entitled to reimbursement of medical aid in the amount of \$29,939.20?
6. Is Claimant entitled to future medical treatment?

### **EXHIBITS<sup>1</sup>**

The following exhibits were offered by Employer and admitted:

1. Deposition of Dr. Ted Lennard

The following exhibits were offered by Claimant and admitted:

#### Medical Records

- A. St. John's Health Center, 78 pages, certified 2/4/2008
- B. Doctor's Hospital, 10 pages, certified 10/13/08
- C. Dr. Jim Blaine, 16 pages
- D. St. John's Clinic, Orthopedic Specialists, 4 pages, certified 5/29/2007
- E. St. John's Clinic, Orthopedic Specialists, 18 pages, certified 1/28/2008
- F. St. John's Health Center, 167 pages, certified 6/4/2007

#### Medical Bills

- G. St. John's Physicians and Clinics, 11 pages, certified 8/8/2008 (\$14,937.50)
- H. St. John's Regional Medical Center, 31 pages, certified 6/26/2008 (\$14,461.70)

#### Medical Report

- I. Dr. P. Brent Koprivica, dated 4/23/2008
  1. Addendum, 7/27/2008
  2. Addendum, 8/30/2008

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<sup>1</sup> Any highlighting or marks appearing on the various exhibits were made prior to the exhibits having been admitted into evidence. These marks were not made by the Administrative Law Judge.

3. CV

Additional Documents

- J. Claim
- K. Answer, Second Injury Fund
- L. Answer, Employer/Insurer, Labor Finders
- M. Claim, Amended
- N. Answer, Employer/Insurer, Labor Finders/ACE USA/EGIS
- O. Answer Amended, Employer/Insurer, Labor Finders/ACE USA/EGIS
- P. Answer Amended, Employer/Insurer, Labor Finders/ACE USA/EGIS
- Q. Claim, Amended
- R. Answer Amended, Employer/Insurer, Labor Finders/ACE USA/EGIS
- S. Hearing Correspondence
  - 1. Medical Records sent to Counsel, 8/6/2007
  - 2. Letter dated 5/14/2008
  - 3. Billing statements sent to Counsel, 7/18/2008
  - 4. Billing statements sent to Counsel, 8/20/2008
  - 5. Letter dated 9/10/2008
  - 6. Letter dated 9/23/2008

Depositions

- T. Steve Ralston, Employer, Buske Lines, Director of Safety Compliance & Recruiting Exhibits 1-2
- U. Phillip Watts, Employer, Labor Finders, Branch Manager Exhibits 1-5
- V. Dr. Koprivica

**FINDINGS OF FACT**

Matthew Sisak (Claimant) is 38 years old. Although he attended college, he has no degree. He has worked as a mechanic, in a fast food restaurant, and in a number of maintenance or laborer positions. On April 28, 2006, Claimant was working for Taco Bell, but he also was employed by Labor Finders as a day laborer. Labor Finders, a temporary employment agency, assigned Claimant to work for Buske Lines, Inc. Buske is a warehouse and trucking company. It operates at the Springfield Underground, which is an underground storage facility.

Claimant worked only one day at Buske Lines, Inc. His job on April 28, 2006, was to work with another person loading steel girders onto a box trailer. He performed this task for eight hours, with an intervening lunch break. He would squat to pick up the girder, which he

estimated weighed a couple hundred pounds. He lifted the girder and placed it on his right shoulder to carry it. It was heavier work than what Claimant typically performed. At the end of the day, he was "sore all over."

Claimant contends that within a few days his soreness had dissipated, except for his shoulder. He contends that he called Tiffany, an office manager at Labor Finders, to report the problems with his shoulder. She purportedly suggested that Claimant was not hurt, and he should get treatment on his own. Claimant also contends he told Phillip Watts, the branch manager of Labor Finders, about his injury within 10 days of the event. Claimant said that Watts refused to file the claim under workers' compensation.

While Tiffany did not testify, Phillip Watts testified by deposition, and flatly denied that Claimant had told him of any injury while working at the Springfield Underground. Watts said either he or Tiffany would have been the individual to have filed a report of injury had Claimant advised Labor Finders of an injury. In fact, Watts noted that Claimant had injured himself on January 10, 2006, while working at Vermillion. A report of injury was made that date by Labor Finders for an injury to the back. Employer sent Claimant for medical treatment for that injury. Attached to Watts' deposition are the sign-in and sign-out sheets for April 28, 2006. The sign-out sheet advises workers that by signing they are stating that they suffered no injury and no accident that date. Claimant signed the sheet, and did not indicate he had suffered any injury.

Watts further testified that Claimant was dispatched to yet another job on May 3, 2006, just five days after the alleged incident at the Springfield Underground. Claimant was dispatched to the Killian Turner job site at the Branson Landing in Branson, Missouri. Claimant said his job at the Branson Landing involved sweeping. Claimant not only performed this job, but he also continued to work for Taco Bell as a line prep cook. He only took off work at Taco

Bell to go to the emergency room in May 2006. In light of the conflicting evidence, I find as not credible, the Claimant's testimony that he advised Tiffany and/or Mr. Watts of an injury within days of the work at the Springfield Underground.

Claimant twice went to the St. Johns emergency room for treatment for a shoulder injury. The first was May 7, 2006, at which time Claimant reported pain for a period of one and one-half weeks, with no known injury. The clinical impression was "Degenerative Rotator cuff." (Exhibit F). Claimant returned for medical care on May 11, 2006. The emergency room record notes that the Claimant "can't remember" the mechanism of injury. Elsewhere in the medical records, the medical care provider circled "repetitive hand use at work" and wrote that the pain started a "month ago." This time, Claimant was diagnosed with a "rotator cuff."

The next medical record is for treatment six months later on November 20, 2006 for low blood sugar. Claimant sought no other medical treatment for his shoulder for a period of nearly a year.

Claimant began working for Paul Mueller in the fall of 2006, where they provided a free in-house medical clinic with Dr. Blaine. Claimant's job at Paul Mueller required that he hold a grinding tool for several hours to polish stainless steel tanks. About six months after starting work at Paul Mueller, on March 19, 2007, Claimant saw Dr. Blaine for sinus congestion. The medical records also note that Claimant had tenderness of the right shoulder from an injury "over a year ago." A subsequent MRI revealed a labrum tear. In May 2007, Claimant broke his foot working for yet another employer. Claimant then was referred to Dr. Crites. The intake sheet with Dr. Crites in September 2007 indicates an onset of complaint to the shoulder was in "Feb of '06." Dr. Crites diagnosed tendinopathy, labral tear and impingement syndrome. Dr. Crites performed an arthroscopy on October 9, 2007 to decompress and debride the shoulder.



After consulting an attorney about his foot injury, Claimant made his initial claim for compensation for the shoulder, alleging an injury date of February (no specific day) 2006.

Claimant was unsure of the date of injury to his shoulder. After discovery, the claim was amended to reflect the date that Claimant worked at the Springfield Underground.

### **Medical Expert Evidence**

#### **Dr. Ted Lennard**

Dr. Lennard opined that work at the Springfield Underground was not “the prevailing factor” in the development of Claimant’s rotator cuff injury. Irrespective of whether Claimant’s injury occurred in April or some earlier date, his opinion remained unchanged. He also indicated that in this case it made no difference whether the employee alleged a single traumatic incident or repetitive lifting over the course of a day. As Dr. Lennard explained, a labral tear would result in abrupt symptoms. He said it would be unusual for one not to know of an injury for a couple of weeks. He found it significant that the emergency room personnel recorded “on two separate occasions there was no known injury and he [Claimant] was unable to remember anything that caused his right shoulder problem.” (Ex. 1, p. 16).

#### **Dr. P. Brent Koprivica**

Dr. Koprivica believed the work of lifting steel girders in April 2006 was the prevailing cause of Claimant’s injuries, specifically the biceps tendon and problems with the labrum of the shoulder. While he admitted that emergency room records in May 2006 did not reference any specific work-related injury, he said it wasn’t unusual for someone with exposure to repetitive type lifting not to realize right away that they had suffered an injury from the repetitive lifting, “that’s a common story that you see.” Dr. Koprivica also admitted, however, that had he been given the same history that Claimant gave to emergency room personnel in May 2006, he would

not have been able to find that work was the prevailing factor in the shoulder injury.

### **CONCLUSIONS OF LAW**

It is Claimant's burden to meet every element of his claim by reasonable probability. *Dunn v. Treasurer of Missouri*, 272 S.W.3d 267 (Mo. App. E.D. 2009). Under the strict statutory scheme adopted in 2005, Claimant must prove not only that his work with Labor Finders at the Springfield Underground exposed him to the hazards of the alleged repetitive trauma, but he must prove this exposure to be the primary factor in relation to any other factor in causing his resulting medical condition and need for treatment.

There are numerous factual inconsistencies in this case. First, Claimant initially was mistaken as to when the alleged injury occurred, believing first that it occurred in February. Not only does the initial claim for compensation give a February 2006 injury date, but so does the intake form with Dr. Crites. Second, when Claimant completed the sign-out form in April 2006, after working at the Springfield Underground, he indicated that he was not injured. Third, a few days after Claimant worked at Springfield Underground, he returned to Labor Finders and accepted a construction job assignment at the Branson Landing that required sweeping. Such fact suggests that Claimant had not sustained a shoulder injury just a few days earlier. Fourth, he continued to perform his job at Taco Bell with no apparent limitation. Fifth, when he did go to the emergency room in May with symptoms of shoulder pain, he could not identify any specific incident or activity that could have caused his symptoms. This led the emergency room physician to diagnose a "*degenerative*" right rotator cuff.

Even Dr. Koprivica indicated that if Claimant had given him the same history that he had given to the emergency room personnel in May 2006, he would not have found the work with Labor Finders to have been the prevailing factor.

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Based on the record as a whole, and particularly the opinion of Dr. Lennard, whose testimony I find credible, I conclude that Claimant failed to sustain his burden of proof. I conclude that he did not sustain an injury by accident or by repetitive trauma within the course and scope of his employment with Labor Finders. I conclude that the work at Labor Finders was not the prevailing factor in Claimant's medical condition or disability to his shoulder and biceps tendon.

Compensation is denied. Because of this ruling, I do not address the remaining issues.

Date: December 11, 2009

Made by: /s/ Victorine R. Mahon  
Victorine R. Mahon  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

/s/ Naomi Pearson  
Naomi Pearson  
Division of Workers' Compensation